jective standard for identifying meritorious claims at an early stage of litigation. Respondent's purely subjective motive test provides no objective, much less workable, criterion for identifying meritorious claims and, instead, would only invite additional litigation by disgruntled former defendants and intrusive discovery into the prosecutorial process.[2]

3. As the opening brief explains (at 24-30), the common law tort of malicious prosecution furnishes the proper framework for identifying the elements of a claim of retaliatory prosecution in violation of the First Amendment. That tort—and the strict limits placed on it to protect the public interest in pursuing well-founded prosecutions—predated the First Amendment, and this Court has repeatedly recognized that the absence of probable cause is an element of the tort. See Pet. Br. 26-29. As the Court has explained, "a person actuated by the plainest malice may nevertheless prefer a well-founded accusation." *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544, 550 (1861). The requirement of showing an absence of probable cause serves to protect the public interest in proceeding with such a "well-founded accusation." See also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984) ("[I]t is the part of a good citizen to bring about the prosecution of those who are reasonably suspected of crime, and the addition of a personal motive should not result in liability for performing a public obligation."); cf. *Devenpeck* v. *Alford*, 125 S. Ct. 588, 594

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[2] The requirement to show the absence of probable cause can be conceptualized either as an objective screen analogous to the similarly situated requirement in retaliatory prosecution claims, or as a recognition that individuals lack a constitutionally protected interest in a prosecutor's decision to exercise discretion not to prosecute despite the existence of probable cause, unless that decision is based on a suspect classification. Either way, the requirement to show the absence of probable cause reflects an appropriate reconciliation of First Amendment interests with the unique nature of the decision whether or not to initiate a prosecution.

(2004) (subjective motivation of police officer irrelevant to lawfulness of arrest supported by probable cause).[3]

Respondent contends that, while it is appropriate to "look to the common law to determine the contemporaneous understanding of particular terms * * * used in the Constitution," it is not appropriate to "search for a common-law tort analogy" to the particular context in which the constitutional right is raised and then "use that analogy to contract the scope of the constitutional right." Br. 31 (emphasis omitted). The suggestion that adherence to the common law would contract the scope of a constitutional right, however, simply assumes the answer to the question presented in this case: whether the First Amendment accords a right to be free from a prosecution that is fully supported by probable cause simply because an investigative officer was motivated by a desire to retaliate against the defendant for his speech. And contrary to respondent's suggestion that petitioners are not relying on the common law "to determine the content" of the First Amendment (*ibid.*), the fact that the Founding-era common law did *not* accord a right to be free from a prosecution supported by probable cause that was motivated by a malicious purpose (see Pet. Br. 28-29) is evidence of the "contemporaneous understanding of [the First Amendment's] guarantees," *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984). Cf. *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972) (holding that First Amendment accords no right to withhold identity of confidential source from grand jury, and relying, in part, on fact that, "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a

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[3] Respondent's theory presumably would provide a constitutional tort remedy no matter how manifestly guilty the defendant, so long as the "smoking gun" evidence was rooted out by an officer who had a retaliatory motive. The societal interest in ensuring that the prosecutor, who controls the intervening decision to prosecute, has all available probative evidence suggests the need for caution in policing the motives of those who furnish the prosecutor with evidence of a crime.

newsman to refuse to reveal confidential information to a grand jury"). Nor is there anything unusual about relying upon "a common-law tort analogy" (Resp. Br. 31) in this context. See, *e.g.*, *Wilson* v. *Arkansas*, 514 U.S. 927, 933 (1995) (unanimously holding that common law "knock and announce" principle is part of reasonableness inquiry under Fourth Amendment; relying, in part, on fact that "[e]arly American courts" embraced that principle; and citing decisions involving common law tort of trespass) (citing *Walker* v. *Fox*, 32 Ky. (2 Dana) 404 (1834), *Burton* v. *Wilkinson*, 18 Vt. 186 (1846), and *Howe* v. *Butterfield*, 58 Mass. (4 Cush.) 302 (1849)).

4. As the opening brief makes clear (at 30-34), the court of appeals' standard disregards the special considerations that govern constitutional challenges to a decision to prosecute. Respondent contends, however, that "[t]he relative competence of prosecutors and courts in determining whether a prosecution is justified" has no relevance when it is *law enforcement officers* who "procure[] [an] indictment and prosecution" with "retaliatory animus." Br. 33. Respondent acknowledges that, under the court of appeals' approach, courts would still routinely be required to examine "the *prosecutor*'s decisionmaking as part of their inquiry into causation," but argues that "the purpose of doing so will not be to second-guess the prosecutor, but to determine whether an individual subjected to a retaliatory prosecution was actually injured thereby." *Ibid.* But while second-guessing the prosecutor might not be the purpose of the inquiry, it would be the effect. Indeed, an inquiry whose purpose is to divine whether a prosecution would have been brought absent certain input would require both a reconstruction of the prosecutorial decisionmaking that led to a particular indictment and a broader inquiry into prosecutorial standards to determine whether a particular prosecution was typical. Such inquiries would threaten to "chill law enforcement by subjecting the prosecutor's motives and decisionmaking to out-

side inquiry" and "undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607). Those are the principal reasons for "[j]udicial deference" in this area. *Ibid.*

Respondent also contends that petitioners have "greatly overstate[d]" the extent to which his rule would impair "a core executive function," because, under his approach, a retaliatory prosecution claim "will be viable only where, as here, law enforcement officers had a substantial role in procuring the indictment or prosecution." Br. 34. But it is the rare case in which law enforcement officers *do not* play a substantial role in procuring a prosecution. Prosecutors generally do not discover criminal conduct on their own; cases are brought to them for prosecution (or at least for further investigation) by law enforcement officers, who thereby become potential defendants in a retaliatory prosecution suit. As amici National League of Cities *et al.* explain, the court of appeals' approach would "discourage law enforcement officers from pursuing the prosecution of serious crimes," and thus "undermine[] the strong public interest in having law enforcement officers present cases of criminal conduct to prosecutors." Br. 18.

According to respondent, the rule that petitioners advocate is unnecessary, because district courts can employ "various procedural mechanisms," including requiring more specific allegations, narrowly focused discovery, and summary judgment, to "screen out baseless motive claims and avoid unnecessary and burdensome discovery." Br. 34-35. This Court has never relied on such mechanisms in cases involving a constitutional challenge to the decision to prosecute, however, and it certainly has not done so in selective prosecution cases. A successful claim of selective prosecution is a "*rara avis*," *AADC*, 525 U.S. at 489, not because of procedural mechanisms, but because there is "a rigorous

standard for *the elements*" of the claim, *Armstrong*, 517 U.S. at 468 (emphasis added).

Respondent says that "trials of claims relating to retaliatory procurement of indictments and prosecutions are exceedingly rare," and that he is unaware of any case in the circuits that apply his standard in which a government official has been found liable. Br. 35. But a decision by this Court embracing his standard could change all that, by causing more cases to be brought and leading to verdicts against law enforcement officers following well-founded prosecutions. In any event, it is not only the fact that law enforcement officers will be required to stand trial, or will be found liable, that "threatens to chill law enforcement" and "undermine prosecutorial effectiveness." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607). The filing of the lawsuit itself, which, under respondent's standard, cannot be terminated at an early stage on the basis of an objective showing, would have that effect. Indeed, the *mere possibility* that a law enforcement officer who recommends prosecution will be subject to a civil suit despite the existence of probable cause may lead the officer to "shade his decision[] instead of exercising the independence of judgment required by his public trust." *Imbler* v. *Pachtman*, 424 U.S. at 423.

B. There Is No Cause Of Action Under *Bivens* If There Was Probable Cause For The Charges

There is no merit to respondent's arguments (Br. 39-43) against the narrower ground for reversing the court of appeals—*i.e.*, that absence of probable cause is an element of the constitutional tort of retaliatory prosecution (see Pet. Br. 36-37). Even if *Heck* v. *Humphrey*, 512 U.S. 477 (1994), does not require *every* Section 1983 or *Bivens* plaintiff to establish "each substantive element" of the common law tort most analogous to the constitutional violation asserted (Resp. Br. 43), there are no countervailing considerations that would

justify *not* incorporating the elements of the common law tort of malicious prosecution into the constitutional tort of retaliatory prosecution. On the contrary, the principal considerations that bear on the question (other than the firmly grounded rule of the common law itself) are those that counsel great hesitation in reviewing a decision to prosecute, and they strongly confirm the correctness of limiting the availability of a damages action for retaliatory prosecution to cases in which probable cause was absent. The Court relied on considerations of that kind in holding that 42 U.S.C. 1983 incorporates the common law rule of absolute immunity for prosecutors, see, *e.g.*, *Burns* v. *Reed*, 500 U.S. 478, 484-487 (1991); *Imbler*, 424 U.S. at 420-429, and they likewise justify incorporating the elements of the common law tort of malicious prosecution in a damages action for retaliatory prosecution against investigators. Cf. *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) ("special factors" preclude recognition of *Bivens* cause of action by enlisted military personnel against superior officers). Inasmuch as prosecutors (like the one in this case) are absolutely immune from a damages suit for retaliatory prosecution even though it is they who make the ultimate decision to prosecute, it can hardly be objected that such a result is overly protective of other law enforcement officers, who enjoy only qualified immunity from a retaliatory prosecution suit despite being able to do no more than recommend that a prosecution be brought. Cf. Pet. App. 50a n.2 (earlier appeal) ("It may seem odd that the only official who could not be held liable for * * * retaliatory prosecution is the prosecutor.").

Contrary to respondent's contention (Br. 37-39), the fact that this case is on appeal from the denial of petitioners' motion for summary judgment on the ground of qualified immunity, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985), does not prevent the Court from deciding the case on the

narrower ground.[4] An appellate court's jurisdiction to consider a claim of qualified immunity gives it the authority to consider the antecedent question whether a *Bivens* cause of action is available at all. See Pet. Br. 37 n.12 (citing cases). As the Eighth Circuit has explained, the question whether a cause of action is available is "purely legal," and it is "'inextricably intertwined' with," "analytically antecedent to," and "in a sense also pendent to" the question whether the defendants violated a clearly established constitutional right. *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1083 (8th Cir. 2005) (internal quotation marks omitted), petition for cert. pending, No. 04-1611 (filed May 31, 2005). Moreover, the issue is potentially "dispositive," and deciding it "serves the interests of judicial economy." *Ibid.* Federal officers should not be burdened with "the cost and time of litigating a lawsuit which, if no *Bivens* remedy exists, is doomed from its inception." *Ibid.*[5]

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[4] Nor does the fact that the ground was not separately relied upon in the lower courts. The theories advanced by petitioners in this Court —that the absence of probable cause is an element of a First Amendment claim and that (even if it is not) it is an element of a *Bivens* cause of action—are "not separate *claims*"; they are, rather, "separate *arguments* in support of a single claim"—namely, that the existence of probable cause defeats a claim of retaliatory prosecution. *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378-379 (1995). The question on which certiorari was granted, moreover, is not whether the First Amendment is violated when a prosecution motivated by the defendant's speech is supported by probable cause, but whether officers "may be liable" for retaliatory prosecution when there was probable cause for the charges. Pet. I.

[5] *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995), on which respondent relies (Br. 38-39), is not to the contrary. It was undisputed in *Swint* that the denial of the county commission's summary judgment motion was not "inextricably intertwined" with the denial of the police officers' request for qualified immunity. 514 U.S. at 51. The same cannot be said, however, of the questions at issue here. See *Nebraska Beef*, 398 F.3d at 1083.

II. THERE WAS PROBABLE CAUSE FOR THE CHARGES AGAINST RESPONDENT

Respondent acknowledges (Br. 13, 16, 44, 50) that, if the absence of probable cause is an element of a claim of retaliatory prosecution, petitioners are entitled to qualified immunity as long as a law enforcement officer could reasonably have believed that there was probable cause for the charges. See *Hunter* v. *Bryant*, 502 U.S. 224, 228-229 (1991) (per curiam); *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). Respondent contends, however, that petitioners "could not reasonably have believed[] that there was probable cause to prosecute [him]." Br. 44. That contention is without merit.

Respondent relies on the fact that "the known conspirators" did not admit that they "ever told [respondent] * * * about the payments at the core of the conspiracy." Br. 45. Contrary to respondent's contention, however, petitioners have never "fail[ed] to acknowledge" that fact. *Ibid.* As explained in our opening brief, the basis for the charging decision was not testimony from co-conspirators, but the "considerable circumstantial evidence" that respondent knowingly participated in the criminal schemes. Pet. Br. 4; see *id.* at 4-7, 39-41 (describing evidence). It is hardly unusual for a complex fraud conspiracy prosecution to be based mainly, or even entirely, on circumstantial evidence. See *id.* at 38. As this Court has observed, moreover, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 508 n.17 (1957)).[6]

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[6] Respondent contends that most of the evidence identified in petitioners' opening brief "purports to show [his] knowledge of the conspiracy," and that "mere knowledge of a conspiracy is insufficient to create criminal liability." Br. 46; see also *id.* at 44. But criminal intent "can rarely be proved by direct evidence," *Bailey* v. *Alabama*, 219 U.S. 219, 233 (1911), and knowledge of a conspiracy can be circumstantial evidence of membership in it, particularly when, as in this case, the person with

Respondent also challenges the circumstantial evidence on which petitioners relied (Resp. Br. 47-50), but in so doing he asks the Court to consider each item of evidence in isolation. He argues, for example, that there was "nothing suspicious" about one piece of evidence (Br. 47); that a second did "not suggest anything illegal" (*ibid.*); that there was "nothing remotely suspicious" about a third (Br. 48); that a fourth had an "innocent explanation" (Br. 49); and that a fifth was "innocuous" (*ibid.*). Such consideration of each item of evidence "in isolation" is "mistaken in light of [this Court's] precedents," *Maryland* v. *Pringle*, 540 U.S. 366, 372 n.2 (2003), which "preclude[] this sort of divide-and-conquer analysis," *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002). While a piece of evidence, by itself, may be "innocuous," *Pringle*, 540 U.S. at 372 n.2, "readily susceptible to an innocent explanation," *Arvizu*, 534 U.S. at 274, "not illegal," *United States* v. *Juvenile TK*, 134 F.3d 899, 903 (8th Cir. 1998), or "not suspicious," *United States* v. *Caldwell*, 423 F.3d 754, 761 (7th Cir. 2005), the question whether there is probable cause must "take into account the 'totality of the circumstances,'" *Arvizu*, 534 U.S. at 274; accord *Pringle*, 540 U.S. at 372 n.2. Based on the totality of the circumstances in this case, see Pet. Br. 4-7, 39-41, petitioners could reasonably have believed that there was probable cause to charge respondent.[7]

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knowledge is a beneficiary of the criminal agreement. See, *e.g.*, *United States* v. *Ranum*, 96 F.3d 1020, 1026 (7th Cir. 1996) ("[P]roof that the defendant had both a motive and an opportunity to deceive the Government provides powerful circumstantial evidence that he acted with the requisite intent."), cert. denied, 519 U.S. 1094 (1997).

[7] Respondent's other arguments concerning probable cause are also without merit.

Respondent asserts that the allegation that he conspired with William Spartin to conceal Spartin's association with Gnau & Associates Inc. (GAI) and Recognition Equipment, Inc. (REI) was "spurious," because, he says, the evidence demonstrated that Spartin openly held himself out to the Postal Service as president of GAI, and that respondent knew that this

III. RESPONDENT'S ASSERTIONS ABOUT THE EVIDENCE CONCERNING PETITIONERS' MOTIVES ARE INACCURATE

Petitioners have consistently denied that they had a retaliatory motive. Although factual issues about petitioners' motives are not now before it, the Court should not be left with a mistaken impression of the record.

For example, respondent erroneously relies (Br. 4) on the fact that he was questioned, and asked to produce records, about lobbying, political contributions, and other activities protected by the First Amendment. Those investigative steps were perfectly appropriate, inasmuch as petitioners were investigating the corruption of a public official who received a portion of the money that REI had spent on lobbying. See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993)

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was so. Br. 45. Far from openly holding himself out as GAI's president, Spartin sought to cover up his affiliation with GAI and REI by backdating a resignation letter and enlisting respondent to assist with a false cover story. J.A. 85, 307.

Respondent also contends that he received information from closed sessions of the Postal Service's Board of Governors "through legitimate congressional channels," and that petitioners were aware of that fact. Br. 48. While respondent may have received information through "congressional channels" before REI retained GAI, J.A. 159, 304, that does not necessarily render such access to confidential Postal Service information "legitimate." In any event, GAI's Michael Marcus admitted that Peter Voss leaked confidential Postal Service information to him and that he passed it on to REI officials. J.A. 68-69, 126.

Finally, respondent asserts that petitioners "concede[d] in a contemporaneous writing that, in their view, their evidence showed that REI, *'but not MOORE . . . individually*, w[as] aware of Voss' corrupt actions.'" Br. 45 (quoting J.A. 333); see also *id.* at 6, 50. The memo to which respondent refers, however, did not address what the "evidence showed." It addressed only what John Gnau, Marcus, and others could "conclusively testify"—*viz.*, that REI, but not Moore individually, was aware of the scheme. J.A. 333. In any event, the issue is not whether petitioners subjectively believed that the charges were supported by probable cause, but whether "it was objectively legally reasonable" to believe that they were. *Anderson* v. *Creighton*, 483 U.S. at 641.

("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

In a similar vein, respondent errs in asserting (Br. 6) that a memo titled "Arguments for Indicting the Corporation" (J.A. 329-334) identified REI's media and political campaign as the first justification for indicting the company (J.A. 329-330). The memo merely identified that campaign as one of nine "bases" for the "conclusion" that "[t]his is a case of an underlying corrupt management strategy to obtain [Postal Service] business rather than the isolated and independent overzealous actions of two corporate officers." J.A. 329-332. Likewise, while respondent claims (Br. 6-7) that a "Details of the Offense" memo (J.A. 301-328) treated respondent's lobbying and media activities as criminal, the memo treated those activities merely as one aspect of an overall "corrupt corporate management strategy" (J.A. 329).

Respondent also asserts that, in an "unprecedented move," petitioners aggressively urged the United States Attorney to charge respondent, Robert Reedy, and REI. Br. 7. But it is hardly unusual for an investigative agency to urge a prosecutor's office to file charges when the agency believes that its investigation has uncovered evidence of a crime. Nor is there anything unusual about the fact that the Chief Postal Inspector wrote letters to the United States Attorney requesting a decision on whether charges would be filed. See J.A. 242. The case involved a corrupt member of the Postal Service's Board of Governors, a Presidential appointee, and the very first allegation of possible wrongdoing on his part was made directly to the Chief Inspector by the Deputy Postmaster General. J.A. 114.

Finally, respondent is mistaken in his assertion (Br. 8, 46) that petitioners engaged in misconduct before the grand jury. There was nothing improper about using summary statements of witnesses, which provide "an economical and expedient means of presenting evidence to a grand jury,"

United States v. *Al Mudarris*, 695 F.2d 1182, 1187 (9th Cir.), cert. denied, 461 U.S. 932 (1983), particularly since the summaries were adopted by the witnesses under oath and the prosecutor and grand jurors had an opportunity to ask follow-up questions, J.A. 105.[8]

* * * * *

For the foregoing reasons, as well as those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2005

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[8] Contrary to respondent's assertion, petitioners did not prevent Frank Bray from "correct[ing]" his statement. Resp. Br. 8. When Bray's counsel wanted to include a particular paragraph, petitioners referred the matter to the prosecutor, who reached an agreement with counsel under which the paragraph would be deleted but the prosecutor would consider asking certain questions before the grand jury that were suggested by Bray's lawyers. J.A. 106, 424-425. Nor did petitioners "attempt[] to coerce" Spartin into incriminating respondent. Resp. Br. 8. Petitioners confronted Spartin, who had signed a non-prosecution agreement, about several matters as to which they believed he was being untruthful, but none involved whether respondent had been told about the kickback payments to Voss. J.A. 93-95, 129-130. And the reason Spartin was shown excerpts of other witnesses' statements was that his lawyer claimed a need to refresh Spartin's recollection and the prosecutor agreed to provide the excerpts. J.A. 96-97, 107-108. Finally, while Spartin did opine in his grand jury testimony that respondent knew about the kickbacks to Voss, the prosecutor cautioned the grand jury that very same day that respondent's knowledge was "a very difficult question." J.A. 102.

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No. 04-1495

IN THE

Supreme Court of the United States

MICHAEL HARTMAN, *et al.*,
Petitioners,

v.

WILLIAM G. MOORE, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether law enforcement agents may be liable in a *Bivens* action for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

The court of appeals held that a First Amendment retaliatory prosecution claim for damages can be pursued against petitioner law enforcement officers even though they had probable cause to believe that respondent had committed several serious crimes. While this case involves a *Bivens* action and was brought against federal law enforcement officers, the holding below establishes a rule of constitutional law which subjects state and local officials to liability under 42 U.S.C. § 1983. Indeed, because the vast majority of criminal proceedings are initiated by state and local officials, their potential liability is substantial. *Cf. United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("The States possess primary authority for defining and enforcing the criminal law.") (internal quotations and other citations omitted).

Beyond this, the judgment below undermines "obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty." W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984). It is in the public interest that law enforcement officers and other government officials refer cases of suspected criminal conduct to prosecutors for them to determine whether a prosecution is warranted. The court of appeals' holding that a retaliatory prosecution claim can be brought if the prosecution was based on "weak probable

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[1] The parties have consented to the filing of this *amicus curiae* brief and their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

cause" offers no guidance to law enforcement officers who, having found evidence of a crime committed by a person who engaged in protected activity, must decide whether to refer the case to the prosecutor. It will discourage law enforcement officers and other officials from pursuing the prosecution of serious crimes.

Because of the importance of the issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

Probable cause is the "long-prevailing standard[]" applied by the courts to determine whether a person has been subjected to an unwarranted criminal prosecution. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). The court of appeals nonetheless held that law enforcement officers can be sued for retaliatory prosecution even if they had probable cause to believe the plaintiff had committed a crime. Because this holding will lead to unwarranted and intrusive judicial scrutiny over prosecutorial and law enforcement decision-making and is unnecessary to protect First Amendment interests, the judgment of the court of appeals should be reversed.

1. The enforcement of the criminal law is one of the fundamental ways in which the executive branch of government exercises its constitutional powers. The Court has therefore recognized that prosecutors have broad discretion in enforcing the criminal law. Accordingly, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotations and citation omitted).

Courts are reluctant to review prosecutorial decision-making for two reasons. First, the courts lack competence to second-guess such factors as a prosecution's deterrence value and the relationship of a case to the government's enforcement priorities. Second, judicial scrutiny of prosecutorial decisionmaking would unduly intrude on a core function which the Constitution vests in a coordinate branch of government.

The court of appeals asserted that its rule "comports with the . . . framework" of this Court's decision in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). Pet. App. 15a. But *Mt. Healthy* did no more than establish a rule of causation as it was clear that protected conduct was a motivating factor in the school board's decision to terminate the teacher's contract. Most significantly, *Mt. Healthy* explained that its rule is context-specific. The fundamental differences between prosecutorial and employment decision-making render reliance on *Mt. Healthy* inappropriate in retaliatory prosecution cases.

While the court of appeals acknowledged that "the criminal context . . . involves considerations of prosecutorial discretion absent in a school employment decision," *id.* at 16a, it nonetheless engaged in an intrusive inquiry into the U.S. Attorney's decision to seek respondent's indictment. Based on an internal memorandum of two officials in the U.S. Attorney's office that observed that the prosecution would be "complicated" and "consume significant resources," *id.* at 26a, the court concluded that these factors were probative of the postal inspectors' hostility towards respondent's First Amendment rights. *See id.* at 28a.

It is altogether unclear why the factual complexity and cost of prosecuting the case was probative of the inspectors' motivation. Indeed, when probable cause supports criminal charges, a court exceeds its authority when it scrutinizes the internal deliberations of the prosecutor's office.

Moreover, a legal rule which results in this type of inquiry would have serious adverse consequences because it will chill candid discussion within the prosecutor's office of the merits of a case. A frank discussion of such factors as the strength and weaknesses of the government's evidence, as well as the costs and benefits of bringing the case, is essential to the proper exercise of prosecutorial discretion. The holding of the court of appeals thus violates separation of powers principles because it "interfere[es] with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney v. District Court*, 124 S.Ct. 2576, 2588 (2004) (citation omitted).

2. The court of appeals held that "[a] *Bivens* recovery remains possible . . . in those rare cases where strong motive evidence combines with *weak probable cause* to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." Pet. App.19a-20a (emphasis added). This Court should reject this rule as unworkable.

The court of appeals did not explain how to identify what constitutes "weak probable cause" or "quite weak indicators of probable cause." *Id.* at 20a. Indeed, the court's approach provides no guidance either to trial courts ruling on retaliatory prosecution claims or to law enforcement officers, who having obtained evidence of criminal activity by a person who engaged in protected activity, must determine whether to refer a case to the prosecutor.

Probable cause has long been the standard used by the courts to determine whether a person was subjected to an unwarranted criminal prosecution. It is the standard which the prosecution must establish before a grand jury to obtain an indictment. As one of the elements of the claim of malicious prosecution, it is also one of the standards long applied by the courts in assessing whether a person was subjected to an unjustified prosecution. *See* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984).

There is a compelling public interest in bringing criminals to justice. This interest is not diminished because a suspect has at some point engaged in protected activity. The public interest would be seriously jeopardized by a rule which subjects law enforcement officials to liability, notwithstanding the existence of probable cause, for referring a case of criminal conduct to the prosecutor. Under the court of appeals' approach, it will no longer be enough for law enforcement officers to have acted in an objectively reasonable manner when referring a case to the prosecutor's office. Nor will it be enough for law enforcement officers to rely on the professional judgment of a prosecutor that the evidence is sufficient to support a criminal charge. The holding below thus discourages law enforcement officers from forwarding cases of suspected criminal conduct to the prosecutor.

In support of its holding the court of appeals reasoned that "were courts to demand no more than a showing of probable cause . . . law enforcement officers could freely bring marginal cases." Pet. App. 16a. This assertion is plainly erroneous because it ignores that it is the prosecutor who, exercising independent judgment, makes the ultimate decision to seek an indictment and determines whether the evidence is sufficient to support the charge. Prosecutors typically have no interest in trying marginal cases; on the contrary, they have a substantial interest in ensuring that cases taken to trial will result in a conviction. The holding below also disregards the role of grand juries in "determin[ing] whether a charge is founded upon reason or was dictated . . . by malice." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

In short, the ordinary procedures of the criminal law and the probable cause standard have long provided adequate protection against unfounded criminal charges and prosecutions prompted by personal animus or hostility to protected activity. The court of appeals offered no convincing explanation why these procedures and the probable cause

standard do not protect First Amendment rights. Its judgment should therefore be reversed.

ARGUMENT

THE EXISTENCE OF PROBABLE CAUSE DEFEATS A RETALIATORY PROSECUTION CLAIM

The court of appeals ruled that respondent could pursue his claim that petitioners violated the First Amendment when they pursued his criminal prosecution notwithstanding that "the officers involved acted on the basis of probable cause." Pet. App. 19a. The court held that a cause of action for retaliatory prosecution exists "where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." *Id.* at 20a. It thus rejected petitioners' contention that they were entitled to qualified immunity.

In so holding, the court below reasoned that its "approach . . . comports with the . . . framework in *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977)." *Id.* at 15a. But *Mt. Healthy* made clear that its rule of causation was context specific and there was no dispute that the employment decision at issue therein was based in part on the teacher's protected speech. More importantly, if adopted by this Court, the holding below will lead to unwarranted and intrusive judicial scrutiny over prosecutorial and law enforcement decisionmaking while doing little to advance First Amendment values. Although this case involves a federal prosecution, its ruling would undoubtedly be applied to suits brought under 42 U.S.C. § 1983 challenging prosecutions initiated by state and local law enforcement officers. *See* Pet. 13; *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)). The judgment of the court of appeals should therefore be reversed.